



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

Paul Babeu

OCT 30 2017

Casa Grande, AZ 85122

RE: MUR 7080  
Paul Babeu

Dear Mr. Babeu:

On June 9, 2016, the Federal Election Commission notified you of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On October 24, 2017, the Commission found, on the basis of the information in the complaint, that there is no reason to believe you violated 52 U.S.C. §§ 30104(b) or 30116(a)(1) by accepting an unreported and excessive in-kind contribution in the form of a coordinated mailer. The Factual and Legal Analysis, which explains the Commission's finding, is enclosed for your information.

The Office of the General Counsel recommended that the Commission dismiss allegations that you violated 52 U.S.C. § 30125(e)(1) and (f)(1) by using nonfederal funds for the mailer, and dismiss allegations that you violated 52 U.S.C. § 30104(b)(3) by accepting unreported contributions related to the creation of Facebook posts, but the Commission was divided on whether to approve those recommendations, and closed the file.

Documents related to the case will be placed on the public record within 30 days. See Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016), effective September 1, 2016.

If you have any questions, please contact Antoinette Fuoto, the attorney assigned to this matter, at (202) 694-1634.

Sincerely,

A handwritten signature in black ink, which appears to read "Mark Shonkwiler / AMF".

Mark Shonkwiler  
Assistant General Counsel

Enclosure  
Factual and Legal Analysis

GA-001-111111

1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3 **RESPONDENT:** Paul Babeu MUR: 7080  
4 Paul Babeu for Congress  
5 Chris Marston in his official capacity as treasurer  
6 Pinal County Sheriff's Office  
7

8 **I. INTRODUCTION**

9 The Complaint alleges that Paul Babeu ("Babeu"), Paul Babeu for Congress and Chris  
10 Marston in his official capacity as treasurer ("Committee"), violated the Federal Election Act of  
11 1971, as amended (the "Act") and Commission regulations by accepting excessive in-kind  
12 contributions from the Pinal County Sheriff's Office ("PCSO") in the form of a coordinated  
13 mailer and coordinated Facebook posts, and failing to report them. For the reasons set forth  
14 below, the Commission finds no reason to believe that PCSO made, and the Committee  
15 accepted, an in-kind contribution regarding the mailer.<sup>1</sup>

16 **II. FACTS**

17 Paul Babeu is the Sheriff of Pinal County, Arizona. He filed a Statement of Candidacy  
18 declaring his 2016 candidacy for the House of Representatives from Arizona's First  
19 Congressional District on January 31, 2016.<sup>2</sup> Paul Babeu for Congress is Babeu's principal  
20 campaign committee, and Chris Marston is its treasurer.

21 The Complaint alleges that on or about February 8, 2016, PCSO distributed a mailer, to  
22 approximately 8,200 households in Pinal County.<sup>3</sup> Titled "Keeping you, your family and our  
23 communities safe," the mailer highlights recent successes of the department, provides safety tips,

<sup>1</sup> The Commission was unable to determine whether it would find no reason to believe that Respondents violated the Act in connection with the Facebook posts, or whether it would dismiss allegations as to the Facebook posts as a matter of prosecutorial discretion.

<sup>2</sup> Babeu won the Republican primary, but lost the 2016 general election.

<sup>3</sup> Compl. at 1-2 (June 6, 2016).

1 and describes volunteer opportunities.<sup>4</sup> It also includes a short introduction from Sheriff Babeu  
2 along with his headshot and several bullet points describing his and PCSO's achievements, such  
3 as "reduced operating budget by 8%." The mailer was distributed 204 days before the  
4 Republican primary and does not mention Babeu's congressional candidacy.

5 The Complaint alleges that the mailer is a communication coordinated between the  
6 Committee and PCSO for which PCSO paid \$6,072, resulting in an unreported and excessive in-  
7 kind contribution to the Committee. In support, the Complaint claims that many of the themes of  
8 the mailer, *e.g.*, border security and immigration, feature prominently in the Committee's  
9 messaging, and that at least two photos of Babeu from the mailer are also posted on the  
10 Committee's website.<sup>5</sup> It further alleges that the mailer was targeted to "high efficacy  
11 Republican voters" to influence the August 2016 Republican primary election.<sup>6</sup>

12 Respondents claim that the mailer does not satisfy the content prong of the coordinated  
13 communications test and therefore is not a coordinated communication.<sup>7</sup> They also question the  
14 Complaint's assertion that they attempted to target Republican primary voters, noting that a  
15 portion of the Pinal County residents who received the mailer reside outside of Arizona's First  
16 Congressional District and, therefore, were not targeted in connection with Babeu's federal

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<sup>4</sup> *Id.*, Ex. A.

<sup>5</sup> *Id.* at 1, Ex. B. The Office of the General Counsel found only one of the photos on the Committee website, a headshot of Babeu.

<sup>6</sup> *Id.* at 1-2. The Complaint alleges that a random sampling of 100 recipients revealed that 85% were eligible to vote in the primary election (open to Independents and unaffiliated voters) and that 58.5% of the individuals sampled were registered Republicans, compared to the 31.2% of total voters in Pinal County who are registered Republicans.

<sup>7</sup> Resp. at 1-2 (Aug. 8, 2016).

1 campaign.<sup>8</sup> Finally, Respondents argue that funding for the mailer required independent  
2 approval by the Pinal County Attorney, which suggests a nonpolitical purpose.<sup>9</sup>

### 3 III. LEGAL ANALYSIS

4 A payment for a coordinated communication is an in-kind contribution from the payor of  
5 the communication to the candidate or candidate committee with which it is coordinated.<sup>10</sup>

6 Payments for coordinated communications are subject to the Act's contribution limits and source  
7 prohibitions, as well as its reporting requirements.<sup>11</sup> The contribution limit for a person in the  
8 2016 election cycle was \$2,700 per candidate per election.<sup>12</sup> The Commission has previously  
9 determined that a local government agency is a "person" under the Act.<sup>13</sup> Accordingly, the  
10 \$6,072 payment for the mailer, if a coordinated communication, would be a \$2,372 excessive in-  
11 kind contribution to the Committee.<sup>14</sup>

12 Commission regulations establish a three-part test to determine whether a communication  
13 is coordinated. Under these regulations, a communication is coordinated when it: (1) is paid for

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<sup>8</sup> *Id.* at nn. 11, 12. The Response also notes that the mailer was not sent to individuals who reside outside of Pinal County, even though Babeu's congressional district extends beyond Pinal County. *Id.*

<sup>9</sup> *Id.* at 2-3.

<sup>10</sup> 11 C.F.R. § 109.21(b).

<sup>11</sup> See 52 U.S.C. §§ 30104(b), 30116(a)(1); 11 C.F.R. §§ 109.21(b), 104.13(a), 104.3, 110.1(b).

<sup>12</sup> 52 U.S.C. § 30116(a)(1); 11 C.F.R. § 110.1(b)(1)(iii).

<sup>13</sup> See Advisory Op. 2000-05 (Oneida Nation of New York) ("the Commission has made clear that State governments and municipal corporations are persons under the Act and are subject to its contribution provisions."); MUR 5815 (Madrid, *et al.*).

<sup>14</sup> Babeu ran in two elections in 2016, the Republican primary and the general election. Thus, even if a portion of the mailer's costs were to be designated to the general election, the purported \$6,072 contribution would still exceed the contribution limits by \$672 (\$2,700 x 2 = \$5,400).

1 by a person other than the candidate or candidate's committee; (2) satisfies one of the five  
2 content standards; and (3) satisfies one of the six conduct standards.<sup>15</sup>

3 The mailer does not satisfy the content prong of the coordinated communications test.  
4 The content standard can be met in one of five ways: (1) if the communication is an  
5 electioneering communication; or it is a public communication that (2) republishes campaign  
6 materials prepared by the candidate's committee; (3) contains express advocacy; (4) clearly  
7 identifies a congressional candidate and is distributed within 90 days of that candidate's election;  
8 or (5) is the functional equivalent of express advocacy, *i.e.*, is "susceptible of no reasonable  
9 interpretation other than as an appeal to vote for or against a clearly identified Federal  
10 candidate."<sup>16</sup>

11 The mailer meets none of these standards. While the mailer appears to be a mass  
12 mailing, a form of public communication,<sup>17</sup> it was distributed 204 days before the primary  
13 election, well outside the relevant time windows for congressional primary electioneering  
14 communications and communications that clearly identify a federal candidate.<sup>18</sup> It is not express  
15 advocacy or its functional equivalent because it does not urge the election or defeat of Babeu or  
16 another federal candidate, nor does it contain language that could only be interpreted by a  
17 reasonable person as urging the election or defeat of a federal candidate.<sup>19</sup> The mailer therefore

<sup>15</sup> 11 C.F.R. § 109.21(a).

<sup>16</sup> 11 C.F.R. § 109.21(c)(1)-(5).

<sup>17</sup> 11 C.F.R. §§ 100.26, 100.27.

<sup>18</sup> 11 C.F.R. §§ 100.29(a)(2), 109.21(c)(1), (4).

<sup>19</sup> Under the Commission's regulations, a communication expressly advocates the election or defeat of a clearly identified Federal candidate if it "[u]ses phrases such as 'vote for the President,' 're-elect your Congressman,' 'support the Democratic nominee,' 'cast your ballot for the Republican challenger for U.S. Senate in Georgia,' 'Smith for Congress,' 'Bill McKay in '94,' 'vote Pro-Life' or 'vote Pro-Choice' accompanied by a listing

1 fulfills the content prong of the coordination communications test only if it is a republication of  
2 campaign materials.

3 The record provides no information indicating that the mailer was distributed after the  
4 publication of similar campaign materials, such as those on the Committee's website. Further,  
5 there appear to be material differences in the mailer and the Committee's website, which indicate  
6 that the mailer is not a republication of campaign materials. Though both the mailer and the  
7 Committee website feature similar issues, those issues are not presented "nearly verbatim," as  
8 the Complaint avers.<sup>20</sup> For example, there is little direct overlap in how the mailer and  
9 Committee website discuss border security, as shown below.

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of clearly identified candidates described as Pro-Life or Pro-Choice, 'vote against Old Hickory,' 'defeat' accompanied by a picture of one or more candidate(s), 'reject the incumbent,' or communications of campaign slogan(s) or individual word(s), which in context, can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say 'Nixon's the One,' 'Carter '76,' 'Reagan/Bush' or 'Mondale!'" 11 CFR 100.22(a). A communication also constitutes express advocacy if "[w]hen taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because- (1) [t]he electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) [r]easonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action." 11 CFR 100.22(b).

<sup>20</sup> See MUR 6502 (Nebraska Democratic Party) Factual and Legal Analysis at 10-11 (finding no campaign republication where communications shared similar themes found in campaign materials but used different language).

PCSO Mailer <sup>21</sup>	Committee Website <sup>22</sup>
<p><b>"Smuggling Interdiction"</b></p> <p>Our Sheriff's Office Anti-Smuggling Unit partners with the U.S. Border Patrol and Homeland Security Investigations on the West Desert Task Force and Silverbell Initiative, both of which are task forces targeting smuggling activities in and through Pinal County.</p> <p>The unit was critical in the arrest of 19 drug cartel scouts in Pinal County. The scouts were living on hilltops overlooking drug smuggling routes, warning smugglers of law enforcement presence. All of the scouts were convicted and sentenced to prison.</p> <p>The Anti-Smuggling Unit works in partnership with the narcotics task force on enforcement actions involving large scale smuggling operations. ASU also targets criminal groups involved in human and drug smuggling in Pinal County.</p>	<p><b>"Leader on Border Security"</b></p> <p>Pinal County is the number one pass through county in all of America for drug and human smuggling, ground zero in the fallout over America's unsecured Southern border.</p> <p>Pinal County contains an estimated 75 – 100 drug cartel cells and listening posts/observation posts, used to facilitate the illegal transportation of people and narcotics into the United States. There have been cartel murders on residential streets, cold blooded executions, and attacks on law enforcement.</p> <p>Sheriff Babeu has acted decisively to disrupt, dismantle and destroy cartel activities. He also assisted Senator McCain and Kyl with the "10-Point Border Security Plan."</p> <p>Sheriff Babeu has emerged as a national leader on border security, and an outspoken critic of the Federal government's failure to fulfill their most solemn obligation to keep us safe.</p>

While both sources discuss the same topic, they use significantly different language. The text of the mailer therefore does not appear to be a republication of campaign materials.

The mailer features a headshot of Babeu in his Sheriff's uniform that also appears on the Committee's website. However, the record does not indicate that the photo is a republication of Babeu's campaign material. The Office of the General Counsel located a cached version of the photo published to the National Sheriffs' Association website in August 2014, well before Babeu's federal candidacy. The Commission therefore concludes that Babeu's headshot is not a republication of campaign materials.<sup>23</sup> The mailer does not fulfill the content prong of the

<sup>21</sup> Compl., Ex. A.

<sup>22</sup> Compl., Ex. D.

<sup>23</sup> Further, even if PCSO did download the headshot from the Committee website, the Commission has previously dismissed complaints involving the alleged republication of campaign photos. *See* MUR 5996 (Bee, *et al.*) (dismissing allegation because photo was publicly available for download at no charge from the campaign's website and was a small portion of the television advertisement at issue); MUR 5743 (Sutton, *et al.*) (dismissing republication allegation where third party obtained photo from publicly accessible website). Here, however, the likelihood that the photo originated from either PCSO or another non-campaign source warrants a no-reason-to-believe finding.



1 coordinated communications test and is not a coordinated communication.<sup>24</sup>

2       The Commission finds no reason to believe that PCSO made, and the Committee  
3 accepted, an unreported, excessive contribution in the form of a coordinated communication.<sup>25</sup>

<sup>24</sup> The Complaint acknowledges that the mailer's content "does not align precisely" with any of the content requirements set forth in 11 C.F.R. § 109.21(c), but claims that the regulation is not an exclusive list of content that constitutes coordinated communications. Compl. at 4. It argues that the alleged targeting of the mailer warrants a more expansive view of coordination communications than the regulations provide. *Id.* at 4-5. However, the regulation clearly defines a "coordinated communication" as one that "satisfies *at least one* of the content standards in [11 C.F.R. 109.21(c)]." 11 C.F.R. 109.21(a) (emphasis added); *see, e.g.*, MUR 6722/6723 (House Majority PAC) Factual and Legal Analysis at 3-4 (concluding video was not a coordinated communication because it did not meet the content prong); MUR 5788 (RFCP, *et al.*) Factual & Legal Analysis at 7 ("Since the mailer does not meet the content prong of the coordinated communications regulation, a coordinated communication did not occur.")

<sup>25</sup> Further, the record does not indicate that PCSO made any expenditures unrelated to public communications that were coordinated with Babeu or the Committee. *See* 11 C.F.R. § 109.20(b).